

## ALL CIRCUIT REVIEW ACT

OCTOBER 2, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOWDY, from the Committee on Oversight and Government Reform, submitted the following

## REPORT

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom was referred the bill (H.R. 2229) to amend title 5, United States Code, to provide permanent authority for judicial review of certain Merit Systems Protection Board decisions relating to whistleblowers, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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## COMMITTEE STATEMENT AND VIEWS

### PURPOSE AND SUMMARY

H.R. 2229, the All Circuit Review Act, makes permanent the all circuit review pilot program, which allows whistleblowers to appeal decisions of the Merit Systems Protection Board (MSPB) to any Federal Circuit.

### BACKGROUND AND NEED FOR LEGISLATION

On November 27, 2012, the Whistleblower Protection Enhancement Act of 2012 (WPEA) became law.<sup>1</sup> This landmark whistleblower law was the first major update to the Whistleblower Protection Act since 1994.

Among the many changes established by the WPEA was the creation of a two-year pilot program to allow the appeal of whistleblower cases from the Merit Systems Protection Board (MSPB) to any federal circuit court of appeals.<sup>2</sup> Prior to the WPEA, exclusive jurisdiction over all appeals from the MSPB resided with the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which was created in 1982, three-and-a-half years after the Civil Service Reform Act of 1978 (CSRA) established the MSPB.<sup>3</sup>

Congress has repeatedly criticized both the MSPB and the Federal Circuit's interpretation of the whistleblower protections implemented by and subsequent to the CSRA. As part of the groundwork that ultimately resulted in the Whistleblower Protection Act of 1989 (WPA), the House Committee on Post Office and Civil Service noted in 1987: "The Special Counsel's ability to secure relief for individuals who have been victims of prohibited personnel practices has been limited because the MSPB has construed the law relating to the protection of Federal employees quite narrowly."<sup>4</sup> The report noted the Federal Circuit provided little better recourse: "Despite the heavy MSPB caseload, Federal Circuit judges have a general inexperience with federal employee case law."<sup>5</sup> Several of the changes and clarifications in the WPA as ultimately passed were directly intended to reverse MSPB and Federal Circuit actions Congress considered inconsistent with the CSRA.

Five years later, Congress made additional clarifications as part of reauthorizing the MSPB and the Office of Special Counsel.<sup>6</sup> The Senate report accompanying the 1994 reauthorization noted the Federal Circuit's failure to interpret the legislative history of the WPA correctly.<sup>7</sup> The corresponding bill report from the House Com-

<sup>1</sup> Whistleblower Prot. Enhancement Act of 2012, Pub. L. No. 112–199, 126 Stat. 1465 (2012).

<sup>2</sup> Whistleblower Prot. Enhancement Act of 2012, Pub. L. No. 112–199 § 108, 126 Stat. 1465, 1469 (2012).

<sup>3</sup> The Federal Courts Improvement Act of 1982 merged the U.S. Court of Customs and Patent Appeals with the U.S. Court of Claims to create the U.S. Court of Appeals for the Federal Circuit, and gave the Federal Circuit jurisdiction over all appeals from the MSPB except anti-discrimination appeals. Fed. Courts Improvement Act of 1982, Pub. L. No. 97–164 § 127, 96 Stat. 25, 38 (1982); see also Civil Serv. Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111 (1978).

<sup>4</sup> H. COMM. ON POST OFFICE & CIV. SERV., WHISTLEBLOWER PROTECTION ACT OF 1987 25, 100th Cong. (1987) (H. Rep. 100–274).

<sup>5</sup> *Id.* at 26.

<sup>6</sup> Pub. L. No. 103–424, 108 Stat. 4361 (1994).

<sup>7</sup> S. COMM. ON GOVERNMENTAL AFFAIRS, TO AUTHORIZE APPROPRIATIONS FOR THE UNITED STATES OFFICE OF SPECIAL COUNSEL, THE MERIT SYSTEMS PROTECTION BOARD, AND FOR OTHER PURPOSES 8, 103rd Cong. (1994) (S. Rep. 103–358).

mittee on Post Office and Civil Service, which was reorganized as part of this Committee the next year, further stated:

[T]he statistical record indicates that the MSPB and Federal Circuit Court of Appeals have not been favorable to Federal whistleblowers. In the first two years after the Act's passage, whistleblowers won approximately 20% of Merit Systems Protection Board decisions on the merits. Since FY 1991, however, that rate has dropped to 5%, far lower than analogous statutes with tougher burdens of proof administered by the Department of Labor. Instead of restoring balance, the U.S. Court of Appeals for the Federal Circuit has been more hostile than the Board. Since its 1982 creation, in reported decisions employees have prevailed only twice on the merits with the whistleblower defense. The committee received extensive testimony at hearings that the MSPB and Federal Circuit have lost credibility with the practicing bar for civil service cases. Due to the MSPB's failure to consistently enforce standards in the Federal Rules of Procedure or the Federal Rules of Evidence, the Board has not earned respect as a fair forum even on procedural grounds.<sup>8</sup>

The report identified a wide variety of areas where the MSPB and Federal Circuit had violated[d] the WPA's clear mandate [established] through statutory provisions or legislative intent.”<sup>9</sup>

Although Congress updated the law in 1989 and 1994 in response to erroneous MSPB and Federal Circuit decisions, the 1994 House report noted: “The committee recognizes that realistically it is impossible to overturn destructive precedents as fast as they are issued by the MSPB or Federal Circuit.”<sup>10</sup> That prediction proved prescient, as Congress did not make any substantive clarifications for nearly twenty years regarding the WPA. The bill reports accompanying the WPEA in 2012 made clear this was not due to a lack of erroneous MSPB and Federal Circuit decisions in the interim. The Senate Committee on Homeland Security and Governmental Affairs report stated:

Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over many cases brought under the Whistleblower Protection Act (WPA). . . . Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected under the WPA.<sup>11</sup>

This Committee concurred that “the Federal Circuit has often times misinterpreted Congressional intent when it comes to whis-

<sup>8</sup>H. COMM. ON POST OFFICE & CIV. SERV., REAUTHORIZATION OF THE OFFICE OF SPECIAL COUNSEL 17, 103rd Cong. (1994) (H. Rep. 103–769).

<sup>9</sup>*Id.* at 18.

<sup>10</sup>*Id.*

<sup>11</sup>S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2012 1–2, 4–5 112th Cong. (2012) (S. Rep. 112–155).

bleowers.”<sup>12</sup> The Committee’s WPEA bill report noted: “Unfortunately, . . . the U.S. Court of Appeals for the Federal District has eroded whistleblower protections over the years through a series of decisions. This has adversely impacted well-intentioned whistleblowers and led to an unwillingness by many to step forward.”<sup>13</sup> Subsequent Committee reports noted the Federal Circuit’s “overwhelming record of ruling against whistleblowers—a record that included a series of questionable interpretations of the law.”<sup>14</sup>

This experience since the CSRA, particularly from 1994 to 2012, informed Congress’s decision to establish the all circuit review pilot program with the WPEA. Despite innumerable significant public policy priorities which routinely compete for the attention of policy-makers, Congress has repeatedly sent a consistent message regarding its intent that the WPA protect federal employees who blow the whistle. However, relying on regular clarifying revisions is unrealistic. Despite thousands of man-hours that may go into bringing particular legislation to the floor of the House or Senate, a number of obstacles may preclude enactment into law in any given Congress. Thus, just as courts rely on the doctrines of ripeness and exhaustion of remedies to conserve judicial resources, so too Congress often conserves its resources by allowing statutory questions to play out in the court system. Eliminating the Federal Circuit’s monopoly on whistleblower cases makes it possible for more courts to hear these important issues and for the Supreme Court to consider provisions of the WPA in the event of a circuit split.

On September 26, 2014, Congress passed the All Circuit Review Extension Act, introduced by Ranking Member Elijah Cummings (D-MD) with then-Chairman Darrell Issa (R-CA) and Representatives Blake Farenthold (R-TX), Gerald Connolly (D-VA), and Chris Van Hollen (D-MD) as original cosponsors.<sup>15</sup> The bill extended the initial two-year pilot program by three years, allowing additional time to assess the pilot program’s impact.<sup>16</sup>

During a December 2015 hearing to reauthorize the MSPB, then-MSPB Chairman Susan Grundmann stated: “The MSPB is not aware of any ‘significant problems’ resulting from all-circuit review.”<sup>17</sup> As of February 2016, the MSPB indicated there had been six decisions in whistleblower cases issued by federal appeals courts other than the Federal Circuit.<sup>18</sup> By February 2017, there had only been 29 such cases, according to data provided by the MSPB.

#### LEGISLATIVE HISTORY

On April 28, 2017, Ranking Member Elijah Cummings (D-MD) introduced H.R. 2229, with Representative Blake Farenthold (R-TX). H.R. 2229 was referred to the Committee on Oversight and

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<sup>12</sup> H. COMM. ON OVERSIGHT & GOV’T REFORM, WHISTLEBLOWER PROTECTION ENHANCEMENT ACT OF 2011 6, 112th Cong. (2012) (H. Rep. 112-508).

<sup>13</sup> *Id.* at 6.

<sup>14</sup> H. COMM. ON OVERSIGHT & GOV’T REFORM, ALL CIRCUIT REVIEW EXTENSION ACT 2, 113th Cong. (2014) (H. Rep. 113-519).

<sup>15</sup> All Circuit Review Extension Act, Pub. L. No. 113-170, 128 Stat. 1894 (2014).

<sup>16</sup> See H. COMM. ON OVERSIGHT & GOV’T REFORM, ALL CIRCUIT REVIEW EXTENSION ACT, 113th Cong. (2014) (H. Rep. 113-519).

<sup>17</sup> *Merit Sys. Prot. Bd., Office of Gov’t Ethics, & Office of Special Counsel Reauthorization: Hearing before the H. Subcomm. on Gov’t Operations*, 114th Cong. (2015) (Merit Sys. Prot. Bd. responses to Questions for the Record, at 1).

<sup>18</sup> *Id.*

Government Reform, as well as the Committee on the Judiciary. The Committee on Oversight and Government Reform considered H.R. 2229 at a business meeting on May 2, 2017 and ordered the bill favorably reported by voice vote.

#### SECTION-BY-SECTION

##### *Section 1. Short title*

This short title is the “All Circuit Review Act.”

##### *Section 2. Judicial review of merit systems protection board decisions relating to whistleblowers*

This section makes permanent the five-year pilot program allowing all circuit review.

Specifically, subsection (a) allows any petitioner to appeal to any court of appeals of competent jurisdiction so long as the appeal raises no challenge to a Merit Systems Protection Board decision other than its disposition of reprisal allegations.

Similarly, subsection (b) allows the Director of the Office of Personnel Management to do the same.

#### EXPLANATION OF AMENDMENTS

No amendments to H.R. 2229 were offered or adopted during Full Committee consideration of the bill.

#### COMMITTEE CONSIDERATION

On May 2, 2017, the Committee met in open session and ordered reported favorably the bill, H.R. 2229, by voice vote, a quorum being present.

#### ROLL CALL VOTES

No roll call votes were requested or conducted during Full Committee consideration of H.R. 2229.

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CHAIRMAN

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LAMAR S. SMITH, Texas  
STEVE CHABOT, Ohio  
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LOUIE GOHMERT, Texas  
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September 22, 2017

The Honorable Trey Gowdy  
Chairman  
Committee on Oversight and Government Reform  
2157 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Gowdy,

I write with respect to H.R. 2229, the "All Circuit Review Act." As a result of your having consulted with us on provisions within H.R. 2229 that fall within the Rule X jurisdiction of the Committee on the Judiciary, I forego any further consideration of this bill so that it may proceed expeditiously to the House floor for consideration.

The Judiciary Committee takes this action with our mutual understanding that by foregoing consideration of H.R. 2229 at this time, we do not waive any jurisdiction over subject matter contained in this or similar legislation and that our committee will be appropriately consulted and involved as this bill or similar legislation moves forward so that we may address any remaining issues in our jurisdiction. Our committee also reserves the right to seek appointment of an appropriate number of conferees to any House-Senate conference involving this or similar legislation and asks that you support any such request.

I would appreciate a response to this letter confirming this understanding with respect to H.R. 2229 and would ask that a copy of our exchange of letters on this matter be included in the *Congressional Record* during floor consideration of H.R. 2229.

Sincerely,

Bob Goodlatte  
Chairman

cc: The Honorable John Conyers, Jr.  
The Honorable Elijah Cummings  
The Honorable Paul Ryan, Speaker  
The Honorable Thomas Wickham, Jr., Parliamentarian

TREY GOWDY, SOUTH CAROLINA  
CHAIRMAN

ONE HUNDRED FIFTEENTH CONGRESS

ELIJAH E. CUMMINGS, MARYLAND  
RANKING MINORITY MEMBER

**Congress of the United States**  
**House of Representatives**

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September 22, 2017

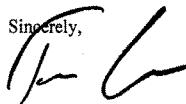
The Honorable Bob Goodlatte  
 Chairman, Committee on Armed Services  
 U.S. House of Representatives

Dear Mr. Chairman:

Thank you for your letter regarding H.R. 2229, the *All Circuit Review Act*. As you noted, certain provisions of the bill fall within the jurisdiction of the Committee on the Judiciary. I appreciate your willingness to forego action on the bill in the interest of expediting this legislation for floor consideration. I agree that foregoing consideration of the bill in no way diminishes or alters the jurisdiction of the Committee on the Judiciary with respect to the appointment of conferees or to any future jurisdictional claim over the subject matters contained in the bill or any similar legislation.

I will include a copy of our letter exchange on H.R. 2229 in the bill report filed by the Committee on Oversight and Government Reform, as well as in the *Congressional Record* during floor consideration, to memorialize our understanding.

Thank you for your assistance with this matter.

Sincerely,  


Trey Gowdy

cc: The Honorable Paul D. Ryan, Speaker  
 The Honorable Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform  
 The Honorable John Conyers, Jr., Ranking Member, Committee on the Judiciary  
 The Honorable Thomas J. Wickham, Parliamentarian

#### APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations. This bill amends title 5, United States Code, to provide permanent authority for judicial review of certain Merit Systems Protection Board decisions relating to whistleblowers. As such, this bill does not relate to employment or access to public services and accommodations.

#### STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

#### STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goal or objective of this bill is to amend title 5, United States Code, to provide permanent authority for judicial review of certain Merit Systems Protection Board decisions relating to whistleblowers.

#### DUPLICATION OF FEDERAL PROGRAMS

No provision of this bill establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

#### DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting this bill does not direct the completion of any specific rule makings within the meaning of section 551 or title 5, United States Code.

#### FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of Section 5(b) of the appendix to title 5, United States Code.

#### UNFUNDED MANDATES STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandate Reform Act, P.L. 104–4) requires a statement as to whether the provisions of the reported include unfunded mandates. In compliance with this requirement, the Committee has included below a letter received from the Congressional Budget Office.

#### EARMARK IDENTIFICATION

This bill does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9 of rule XXI.

#### COMMITTEE ESTIMATE

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974, which the Committee has included below.

#### BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of Congressional Budget Office:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 18, 2017.*

Hon. TREY GOWDY,  
*Chairman, Committee on Oversight and Government Reform,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2229, the All Circuit Review Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Janani Shankaran.

Sincerely,

MARK P. HADLEY  
(For Keith Hall).

Enclosure.

#### *H.R. 2229—All Circuit Review Act*

H.R. 2229 would permanently extend the authority for federal employees to appeal a Merit Systems Protection Board (MSPB) decision regarding whistleblower cases at any federal court, instead of only at the U.S. Court of Appeals in Washington, D.C. Under current law, the authority to appeal at any federal court expires in December 2017.

Based on information from the MSPB and the Administrative Office of the U.S. Courts, CBO expects that allowing appeals to be filed in any federal circuit on a permanent basis would lead to a small increase in the administrative burden of those and other fed-

eral agencies. Because many agency offices are located in the Washington, D.C. area, this would include attorney travel costs and costs associated with researching regional circuit courts' rules and procedures. However, based upon the number of such cases in 2016, CBO estimates that those costs would not be significant.

Enacting H.R. 2229 could affect direct spending by agencies not funded through the annual appropriations (such as the Tennessee Valley Authority); therefore, pay-as-you-go procedures apply. However, CBO estimates that the net effects would be insignificant for each year. Enacting the bill would not affect revenues.

CBO estimates that enacting H.R. 2229 would not significantly increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 2229 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

The CBO staff contact for this estimate is Janani Shankaran. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

#### TITLE 5, UNITED STATES CODE

\* \* \* \* \*

#### PART III—EMPLOYEES

\* \* \* \* \*

#### SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS

\* \* \* \* \*

#### CHAPTER 77—APPEALS

\* \* \* \* \*

#### **§ 7703. Judicial review of decisions of the Merit Systems Protection Board**

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attor-

ney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) [During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition] A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Di-

rector first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) [During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, this paragraph] *This paragraph* shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9) (A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

\* \* \* \* \*

